

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ASTRAZENECA AB, et al, : Case No. CV-11-760 (JAP)
Plaintiffs, :
vs. :
HANMI USA, et al, : 402 East State Street
: Trenton, New Jersey 08608
Defendants. : November 28, 2012

ASTRAZENECA AB, et al., : Case No. CV-12-1378 (JAP)
Plaintiffs, :
vs. :
MYLAN LABORATORIES :
LIMITED, et al., :
Defendants. :
:

TRANSCRIPT OF DISCOVERY CONFERENCE
BEFORE HONORABLE TONIANNE BONGIOVANNI
UNITED STATES MAGISTRATE JUDGE

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1 (Proceedings commence at 11:05.)

2 THE COURT: Good morning. How is everyone.

3 COUNSEL: (Via telephone) Good morning. Good
4 morning, Your Honor.

5 (Participants confer.)

6 THE COURT: We're on the record in Astra v. Hanmi
7 and Astra v. Mylan, 11-760 and 12-1378, respectively.

8 So before I begin, I have two questions, I guess.

9 One is -- or two things to point out. Obviously, we are on
10 the record, so please be careful about what we say regarding
11 information that we don't want disclosed.

12 And then the other thing is: I do recognize that I
13 have to two defendants who are in separate cases. So, Mr.
14 Rank, I need to make sure that there's nothing that I disclose
15 that either defendant wouldn't want the other to hear. I
16 don't know if that goes to you or to the Hanmi and Mylan
17 defendants.

18 So is there anything off the top of your head -- I
19 don't intend to talk about anything specific, in terms of any
20 of the claims or defenses that are being raised. But is there
21 anything that I should not be touching upon, such as the
22 deadlines for the thirty-month stay? In either case, is that
23 something that's private?

24 MR. RANK: This is Mr. Rank. I think the thirty-
25 month stay deadlines are private or confidential --

1 THE COURT: Okay.

2 MR. RANK: -- as reflected in Mr. Flaherty's letters
3 to Your Honor. (Indiscernible) information which we
4 understand is confidential to Hanmi, as well as some
5 information that's confidential to Mylan, although I don't
6 think it will be necessary to specifically get into the
7 details, since they're set forth in the letters to Your Honor.

8 THE COURT: Okay. So let me just caution Hanmi and
9 Mylan, if there's anything that you get the sense I'm going
10 down a path you don't want me to go down, you have the right
11 to scream at me. Okay. So ...

12 MR. BOLAND: Your Honor, Mark Boland for Hanmi.
13 Just briefly.

14 We agree with Mr. Rank on the deadlines for the
15 thirty-day.

16 In the letters that we submitted, as well as AZ
17 letters, there's confidential information concerning FDA
18 status, we'll say.

19 THE COURT: Okay. I won't discuss that, either.

20 MR. BOLAND: Yes.

21 THE COURT: Okay.

22 MR. BOLAND: That's the issue we're concerned about
23 --

24 THE COURT: Okay.

25 MR. BOLAND: -- pretty much.

1 THE COURT: Ms. Bloodworth, anything other than
2 those items from your client's perspective?

3 MS. BLOODWORTH: No, Your Honor. And Mylan doesn't
4 have any concerns with sharing any information with outside
5 counsel for Hanmi. So if anything should arise, we would just
6 ask for perhaps portions of the record to be sealed after the
7 call.

8 THE COURT: Okay.

9 MS. BLOODWORTH: There is no sensitive information
10 that can't be shared.

11 THE COURT: All right. In terms of Hanmi, we are,
12 obviously, awaiting for a decision on the claim construction.
13 I can tell you that Judge Pisano is working on that. I can't
14 promise you when it will be out, but I do think within short
15 order. I wouldn't be surprised if you get that decision by
16 the end of December, so it is on the front burner.

17 I also have, what is on the docket, is the motion to
18 amend claim construction. Without getting into particulars,
19 being entirely candid with you, while that is normally
20 something -- I'm sorry, motion to amend the contentions. I
21 misspoke. While that's normally something that I handle,
22 given that claim construction ruling is being decided now, I
23 am not sure whether Judge Pisano will take that upon himself
24 or whether it will be ours. We are in discussion about that.

25 So in light of those two items, and particularly the

1 fact that we don't have a claim construction, candidly, I
2 don't see how we could hold anyone to this schedule that we
3 have in place. It's just not realistic that December 7th,
4 which is right around the corner, even though I know it's been
5 -- it was raised prior, Superstorm Sandy threw us off track.
6 I was also out for a few days following that because of an
7 awful cold. And I have laryngitis, which is every lawyer's
8 dream. But having said that, we have to amend the schedule.

9 I want to also inform you that, while there was
10 discussion with the District Court about a trial for Hanmi in
11 April, that's not a firm date on their calendar. Judge Pisano
12 is always anxious to deal with these ANDA cases as soon as
13 possible because the thirty-month stay starts to loom. And if
14 he can avoid a preliminary injunction motion - that's always
15 on our radar.

16 So having said that, we've got to deal with the
17 schedule. And my thought is, especially in light of the fact
18 that I'm really hopeful that you will have a claim
19 construction decision soon, as an aside, I don't know how the
20 contention -- amendment of the contention issue is going to
21 impact.

22 But I'm wondering if what I can have you folks do is
23 agree upon a schedule that gives you a period of time
24 following a decision to wrap things up. Generally, I'm not
25 fond of the "within twenty-one days or thirty-day" type

1 schedule because it just is too fluid for me. I usually
2 prefer firm dates. But in this situation, maybe that's
3 something that I can send you folks off to agree upon; again,
4 understanding that we might have a glitch, depending on what
5 happens with the amendment of the contentions. And I
6 recognize there's a whole host of issues with that, as to the
7 parties' mind set as to whether or not that's going to impact
8 claim construction ruling at all.

9 So with that in mind, or with that intro, let me
10 hear from you. I guess would it be you, Mr. Rank, on behalf
11 of Astra?

12 MR. RANK: Thank you, Your Honor.

13 I think that, given what Your Honor just said -- and
14 I would be hopeful that the parties could jointly sit down and
15 work out a schedule. There is already a schedule in place in
16 the Mylan case, which Your Honor so ordered in mid-November,
17 as you know.

18 THE COURT: Yes.

19 MR. RANK: And plaintiffs are seeking to get the
20 same schedule in the Hanmi case.

21 Now I would suggest that -- I guess I heard Your
22 Honor say that, given the circumstances in this case, that
23 perhaps a non-firm date might be acceptable to the Court, in
24 terms of when we get -- when we start expert discovery?

25 THE COURT: Yes. I actually have two thoughts:

1 One is that; and frankly, perhaps mirroring what
2 time frame you folks had in the last order that I entered. I
3 think it was something like less than -- even less than
4 twenty-one days for experts, following the close of fact
5 discovery. So if you were to use something like that, and
6 then all of the other dates, build them out from there.

7 Now the other option would be to have an almost
8 immediate telephone call following the claim construction
9 ruling to determine what impact that has on the schedule.

10 And I also -- in addition to the motion to amend,
11 which I've mentioned, I also know that I have to deal with the
12 deposition issue that Hanmi has raised, which might add
13 another wrench into this -- this discussion.

14 But long-winded way of saying, yes, Mr. Rank, here,
15 I would, if the parties wanted to, entertain something along
16 the lines of within twenty-one days following the ruling on
17 claim construction, you will propound expert reports, or
18 thirty days or the like, and then build everything else out.

19 We may need to shorten some of the time frames, if
20 you want to get this to a spring-type trial.

21 And I should also have mentioned that, at this
22 juncture, it does not appear that Judge Pisano is inclined to
23 require that you be on the same schedule with Mylan, or that
24 they be consolidated. That's something that is really up to
25 him, I think, at this stage, but -- so I'm not looking to have

1 Astra mirror the Mylan schedule for that reason. Does that
2 make sense?

3 MR. RANK: I thought I heard -- this is Mr. Rank
4 again. I thought I heard Your Honor say that Judge Pisano is
5 inclined --

6 THE COURT: No, is not inclined.

7 MR. RANK: All right. I just --

8 THE COURT: I'm not getting any sense right now
9 from Judge Pisano that he's looking at these cases and
10 thinking that it makes -- entirely makes sense for them to be
11 tried together. He could certainly change his mind. But
12 frankly, I think with the claim construction where it is and
13 the amendment of the contentions, where they are, we've just
14 got to have the dust settle, and perhaps have that issue
15 revisited in early 2013.

16 So again, I'm not saying at this point that you
17 should -- that Hanmi should look to or is being instructed to
18 be on the same schedule with Mylan for consolidation purposes
19 at all. I think you need to view Hanmi as an entirely
20 separate case, as it is at this juncture.

21 So let's focus on what you need to do, and not in a
22 vacuum, because now we have real issues. Nobody wants to have
23 a duplication of effort. And if you get expert reports, and
24 then your claims are construed in a different way, what do we
25 do? It just becomes a mess and a nightmare, and perhaps more

1 briefing on why your expert reports should be allowed to
2 amend. And that's just a waste of time, energy, and money for
3 all of you.

4 So again, trying to be practical, I think if we get
5 a schedule that is based on when you get a ruling, with the
6 footnote that outstanding contention issue might cause a
7 wrinkle in that, that would be probably be the best course.

8 But I'm happy to defer to you folks. If you want to
9 have a schedule in mind in principle, or even on the -- on the
10 record, an order entered, but with the right to tell me and
11 ask me for an emergent call once you get your ruling, to talk
12 about what that does; whether it's your ruling on claim
13 construction or whether it's a ruling on the amendment to the
14 contentions. I'm happy to do that.

15 MR. RANK: Your Honor, this is Mr. Rank again.

16 MR. BOLAND: Your Honor, this is Mark Boland. Your
17 Honor, may I comment? Mark Boland on behalf of Hanmi.

18 THE COURT: Sure.

19 MR. BOLAND: We appreciate the Court's comments on
20 those points. And first of all, we'll be happy to confer with
21 Mr. Rank and his colleagues about the schedule.

22 But you know, in terms of where we are, the big
23 picture, you know Hanmi has discussed with Judge Pisano on
24 several occasions the issue of the trial, in light of June
25 29th, '13 thirty-month stay.

1 THE COURT: Okay. Mister --

2 MR. BOLAND: And --

3 THE COURT: Mr. Boland, do you know that you've just
4 mentioned something that, I guess, is your right to mention.

5 But I don't know if you want that --

6 MR. BOLAND: I -- sorry. I said at the outset, Your
7 Honor, that date is not confidential.

8 THE COURT: Oh, I'm sorry. I missed that. Okay.

9 Okay.

10 MR. BOLAND: I just said it was FDA status that was
11 --

12 THE COURT: Okay.

13 MR. BOLAND: -- (indiscernible).

14 And so, you know, in a discussion with Judge Pisano
15 last April, and then again in May following the
16 (indiscernible), and in June following a proceeding on some
17 summary judgment motions, you know, Judge Pisano told us we
18 could have the trial in April, in recognition of the
19 expiration of the thirty-month stay.

20 And what he even told us is that's cutting it a
21 little close, closer than he likes, but you know, if we have
22 to, they'll hustle, and they'll get us a decision. That's his
23 practice, they've done it before --

24 THE COURT: Right.

25 MR. BOLAND: -- and they'll do it here.

1 THE COURT: Okay. Let me just jump in and tell you
2 that you're not on his calendar as a firm trial date. And let
3 me, though, also assure you that Judge Pisano will do
4 everything he can to accommodate all of you, especially in
5 light of the thirty-month stay.

6 I probably have said this to you folks before, but
7 let me just emphasize that there was a situation of a number
8 of years ago now, where a thirty-month stay expired in a case
9 at the end of August. It was not on my radar in the sense of
10 the preliminary injunction motions being filed. And the long
11 and the short of it is -- I'm sure you've experienced -- we
12 had preliminary injunction motions being filed and when Judge
13 Pisano saw them, although I knew the thirty-month stay was
14 coming up, I just didn't think to talk to him -- I'm being
15 entirely candid -- and let him know what was happening and
16 why. And what Judge Pisano simply said is, well, I'm ready to
17 try the case in August, let's just do that.

1 And I'm telling you candidly, I didn't get any
2 fallout from Judge Pisano. The lawyers might have been
3 talking about me under their breath, but we do learn. And I
4 don't want to, again, deal with things ever in a vacuum. So
5 that is a very tortured story, and perhaps more detail about
6 my professional life than you need to know.

7 But we're all really mindful of the thirty-month
8 stay, preliminary injunction motions etc. Judge Pisano is
9 terrific about working with counsel to get things tried
10 expeditiously and get opinions out.

11 I just want to be clear that you are not written in
12 stone for April. If this case has to get tried at the end of
13 April or in May, and we have -- still have that issue with the
14 thirty-month stay looming, then Judge Pisano is going to do
15 what he needs to do to try to reach that date.

16 But again, if we were -- if this case was in a
17 different posture, and I was getting a request for an
18 extension, when we already had claim construction done and
19 there wasn't this motion to amend, we'd be having a different
20 discussion. But I just don't see, Mr. Boland, how I can hold
21 Astra's feet to the fire or yours, tell you to get expert
22 reports done, even if I extended them by two weeks from now,
23 when we don't have rulings, and you're going to have to
24 potentially have a do-over. So I am just --

25 MR. BOLAND: Yeah.

1 THE COURT: I'm just encouraging you to be mindful
2 of all of the dynamics, including the looming thirty-month
3 stay, give me a schedule. And then, once I get what will
4 hopefully be a final schedule, then I and/or, you know, all of
5 us collectively can go to Judge Pisano and then say, we want a
6 firm date, because this looks like it's happening.

7 So I don't know if that helps you at all, Mr.
8 Boland, but I can -- I can assure you that you are not written
9 in stone in his calendar. And even if you were, given this
10 situation, if I needed to go to him and say that we're bumping
11 it by a few weeks or a month, then that's something that he
12 would do. He wants you ready. And we don't want lots of
13 issues percolating unnecessarily because we have moved you
14 along too quickly, and now we have to have things amended.

15 MR. BOLAND: Thank you very much, Your Honor. I
16 appreciate those comments. And that clarifies the window that
17 I think we're targeting then, for us to come back with a
18 schedule that would be subsequent to the Court's ruling on
19 claim construction.

20 || THE COURT: Okay.

21 MR. BOLAND: It's very helpful.

22 But in terms of the Mylan case, Your Honor, we
23 completely agree with the, at least tentative sentiments with
24 Judge Pisano that there's no need for us to be on the same
25 track. And we've put this in a couple of letters to the

1 Court, and I won't repeat everything.

2 But in a nutshell, there's two out of five patents
3 in common. And even as to those two patents, we have a
4 different product than Mylan has. Okay? So we have non-
5 infringement issues that are not present in Mylan case. That
6 means only invalidity of two out of five patents.

7 And even as to invalidity defenses, we haven't been
8 consolidated with Mylan. We did coordinate a couple of AZ
9 and Brenner depositions with them. But we certainly haven't
10 not been consolidated and working on joint defenses. We have
11 different experts. We don't even know their invalidity
12 contentions (indiscernible). So it really makes no sense to
13 even consider consolidating this for trial because it would
14 essentially be two separate trials.

15 THE COURT: Okay. Well, I -- I appreciate your
16 emphasizing what you've stated in your correspondence. And as
17 I said, I have just gotten no indication from Judge Pisano at
18 this point that he's not anxious to consolidate. Certainly,
19 that could change; and if so, you'll be among the first to
20 hear. But I think for now, that issue is really not on our
21 plate.

22 So in terms of your schedule, you and Mr. Rank can
23 talk about what makes sense, again, leaving in place the idea
24 that you can reach out to me for a quick turnaround with a
25 conference call, and I promise you I will get you folks on the

1 phone if we have to talk about the schedule, if there's any
2 glitch.

3 MR. RANK: That's what I was going to suggest, Your
4 Honor. This is Mr. Rank again. Taking up Your Honor's offer
5 to suggest that the parties get in touch with the Court and
6 with Your Honor immediately after the claim construction
7 ruling that's -- that's in front of Judge Pisano presently.
8 That might give Your Honor or Judge Pisano, perhaps, the
9 opportunity also to resolve the motion to amend contentions.

10 Frankly, if the schedule gets -- as we indicated in
11 our opposition, if the Hanmi schedule gets extended by a
12 sufficient period of time, we don't have any objection to the
13 motion to amend contentions.

14 The one issue that, in addition to the opinion that
15 Judge Pisano was working on, on the Hanmi Markman issues,
16 there is what we consider to be a new claim construction issue
17 raised by Hanmi's motion to amend contentions. There's a
18 difference between the parties, such that there's no
19 discussion about a schedule. We've proposed one, but they
20 don't think it's a claim construction issue, so Hanmi is
21 unable to agree to any schedule, I guess.

22 Perhaps -- I guess what we need is some input from -
23 - from Your Honor or from Judge Pisano as to who to write
24 there. But perhaps all of this can be discussed in a
25 conference call immediately after Judge Pisano's ruling on

1 claim construction, during which -- or in preparation for
2 which the parties can attempt to reach a schedule and propose
3 one to Your Honor.

4 THE COURT: Well, let me ask this, though, Mr. Rank.
5 Is there anything that you could be doing, in terms of fact
6 discovery, if that's the issue, with the amendment to the
7 contentions, while we're waiting for a ruling, that would then
8 alleviate your objections?

9 So what I'm hearing is that you view the amendment
10 to require additional discovery because new issues were
11 raised; Hanmi says, not so. Your position, Astra's position
12 is, though, that if you have additional time to do this
13 discovery, then you wouldn't have an objection to the
14 amendment. And if that's right, can you accomplish and
15 proceed with the discovery on the amendments, regardless of
16 how the claim construction ruling comes out? Since it's not
17 going to come out tomorrow, can you work on that during the
18 month of December, and then alleviate your --

19 MR. RANK: The answer is -- the answer is yes, Your
20 Honor. We're certainly willing to have a dialogue with Hanmi
21 about that -- what we perceive to be that new claim
22 construction issue. It's hard to have a dialogue with someone
23 who doesn't want to talk to you, however.

24 THE COURT: Okay. Well --

25 MR. RANK: But it's certainly we can, and I think

1 hopefully work out with them, and get our positions maybe a
2 little more firmly set.

3 THE COURT: Okay. Well, that's what I would like
4 you to do, meet and confer about a proposed schedule. You
5 don't have to send the schedule into me for docketing. But if
6 you'd like to submit a proposal -- because I don't want the
7 discussion to wait until we get a ruling on claim
8 construction. I'd like you to consider best case/worst case
9 for the decision and how it affects what your expert will have
10 to do. Maybe in terms of time, it won't have any impact what
11 Judge Pisano's ruling is on the schedule, but perhaps it's
12 just a matter of whether it's three weeks or thirty days.

13 So if you can have that discussion. And whether you
14 want to send it to me as an informal proposal, just letting me
15 know what you're thinking, or just share it amongst yourselves
16 is -- doesn't matter to me. But I won't docket it as a firm
17 agreement until we have that post-decision discussion.

18 The other thing is, certainly, if you can, meet and
19 confer about addressing giving Hanmi -- the instruction that
20 Hanmi should address AstraZeneca's concerns, and perhaps agree
21 to engage in the additional discovery that would eliminate
22 their objection, even though Hanmi obviously is saying, we
23 don't think that it changes things. But if you can come up
24 with an agreement and get that done, so that we're not wasting
25 more time because, obviously, if there is a ruling that says

1 they can amend and there is a request by Astra to conduct more
2 discovery, then that's more delay, not only for you folks
3 writing, but for me or Judge Pisano deciding, and then you
4 folks getting the work done.

5 So if you can come up with an agreement that would
6 eliminate that issue, especially because we're not having
7 expert discovery conducted now and it could potentially be a
8 couple of more weeks, if not longer, that would be terrific.

9 UNIDENTIFIED: (Indiscernible).

10 UNIDENTIFIED: (Indiscernible) Your Honor, there's
11 one issue --

12 THE COURT: Okay. Can I just jump in one second?

13 Ms. Bloodworth, I know I've asked you to be on the
14 phone. Very little of this applies to you. Do you want to
15 still stay on? I just have the one issue with you folks in
16 Mylan, and that goes to whether or not you have any objection
17 to Astra's amendment of the complaint, because no opposition
18 is filed. Again, I'm happy to have you stay on the phone, but
19 I'm really mindful of your time, and I don't know if there are
20 any Mylan issues that you want to address. If so, you can sit
21 tight; if not, that's the only thing that I have.

22 MS. BLOODWORTH: Thank you, Your Honor. This is
23 Shannon Bloodworth.

24 We -- and first of all, thank you for inviting us to
25 be on the call. We do not have an opposition to AstraZeneca's

1 motion to amend at this time.

2 We -- I would like to put in a placeholder, since
3 there has been a lot of discussion about the scheduling in the
4 Mylan case, which -- in relation to the Hanmi case. And that
5 is to say that we do have two patents in common
6 (indiscernible) litigate defenses, and that does materially
7 affect Mylan's case in this matter, and certainly, obviously,
8 at trial before Judge Pisano on those issues about Mylan's
9 involvement, is something of concern to Mylan.

10 My understanding of the Hanmi case is that there is
11 quite a lot of fact discovery let to be accomplished. So I
12 would just like to, if possible, put down a placeholder for
13 participating in the call after the claim construction
14 decision is issued, to see if it doesn't make some sense to
15 have the two patents that are in the Mylan case on the same
16 track as the Hanmi case.

17 THE COURT: Okay.

18 MS. BLOODWORTH: It's sufficient (indiscernible) you
19 know, we wouldn't have duplicate expert reports, expert
20 depositions, et cetera, in that manner, and certainly would,
21 you know (indiscernible) at least partial of a duplicative
22 trial.

23 THE COURT: All right.

24 MS. BLOODWORTH: So that's really the only -- only
25 thing I wanted to raise with Your Honor.

1 THE COURT: Okay. So then what I will do is, first
2 all, we'll take care of then Astra's motion to amend the
3 complaint, and we'll approve that; probably get it on the
4 docket today or tomorrow. We'll grant that, noting that Mylan
5 has no objection.

6 And then in terms of our next placeholder for Mylan,
7 instead of setting another telephone call, what I will do is
8 include in our notes that, when we do circle the wagons with
9 Astra and Hanmi after the claim construction ruling, we will -
10 - we're anticipating having a phone call, and then we'll
11 include you on that, and then we can go from there. Does that
12 make sense for you?

13 MS. BLOODWORTH: Thank you, Your Honor.

14 THE COURT: Good.

15 Okay. Before I let you go, anything you wanted to
16 raise as to Mylan, other than those issues?

17 MR. RANK: As to Mylan, no, Your Honor. There is
18 the -- bear with me, I apologize. One issue that could impact
19 the length of additional fact discovery we would have with
20 Hanmi, is the pending Hanmi motion before Your Honor with
21 respect to the --

22 THE COURT: Depositions. Okay. I can tell you that
23 I am allowing them to conduct depositions. I can't -- simply
24 don't read that order that you folks entered -- the
25 stipulation that you entered into on July 19th as an entire

1 waiver of Hanmi's rights to depose these individuals.

2 I want to limit them, as Hanmi has said, to the
3 "issues unique to Hanmi's case." And while I'm not limiting
4 them in number right now, that's another issue that I want you
5 folks to confer on because I think it's a page and a half or
6 so of deposition -- individuals who were deposed. And I'm not
7 suggesting that Hanmi gets a run at all of them. So Hanmi
8 needs to select the primary individuals who they want to
9 depose. And if, in light of my ruling, Astra has an
10 objection, let me know.

11 Again, I want the scope limited. I know it's often
12 hard for us as attorneys to start in the middle. We tend to
13 begin at the beginning, going through credentials and the
14 like, or those types of questions. And Mr. Boland, you really
15 have to constrain yourself, or whoever is conducting the
16 deposition, to go just to the meat of whatever Hanmi's issues
17 are. I don't want any of that throat-clearing or repetitive
18 or we're getting warmed up. I want them focused and concise
19 and limited only to the essential individuals. So you have to
20 make that decision, have a chat about that.

21 And again, I know this is a tough time of year. But
22 getting them done as quickly as possible, perhaps while and
23 before we get a decision on this claim construction, would be
24 also very, very helpful.

25 Is there an issue as to location -- or I guess we

1 need to see who they are.

2 UNIDENTIFIED: Your Honor, just one point of
3 clarification, Your Honor.

4 UNIDENTIFIED: (Indiscernible).

5 UNIDENTIFIED: Are you saying that the stipulation
6 remains in force, and that Astra can use the prior dep as per
7 the stip. --

8 THE COURT: Yes. Oh, yes. I'm not -- yes, I am --
9 I am not mooting the stipulation. I am just finding that it
10 doesn't directly address whether or not it eliminates Hanmi's
11 right -- or I don't read it as specifically saying that Hanmi
12 cannot re-depose some of these individuals as to issues in its
13 case. But all of those individuals, you can, pursuant to the
14 Rules of Federal Procedure, I read it as saying, that you can
15 introduce that testimony at trial. That's what your
16 stipulation says, right?

17 So let me go back to Ms. Bloodworth, because I don't
18 want to infringe upon her right to go have an early lunch, if
19 there is such a thing in your world. We're good?

20 MS. BLOODWORTH: Yes, Your Honor. I would just like
21 to say that in the Mylan case, we do not have such a
22 stipulation with the AstraZeneca plaintiffs, and so I would
23 like to coordinate also on those depositions. And we would
24 also agree to keep our questions very targeted to those
25 individuals.

1 THE COURT: Okay. I don't know if you're aware of
2 the docket number, but it's -- I think it's 232 in the Astra
3 case. I don't believe that it's sealed, so you might be able
4 to look at it, if you haven't already, see who the individuals
5 are. And you can certainly ask Astra and Hanmi to keep you in
6 the loop as to who's going to be deposed by Hanmi. And if
7 that -- if you can work out an agreement as to participating
8 in those deps, that would be great for your client, and for
9 Astra, as well.

10 Okay. So I leave it to you, Ms. Bloodworth. Ms.
11 Bloodworth, if you want to sign off, you're welcome to; if you
12 want to remain, that's fine, as well. I appreciate your
13 participation, and we'll include you in the next call.

14 MS. BLOODWORTH: Thank you, Your Honor. I will sign
15 off.

16 THE COURT: Great. All right.

17 MS. BLOODWORTH: Have a good day, everyone. Bye.

18 THE COURT: Let me go back, Mr. Rank. Was there
19 anything that I missed on your end? I know we were talking --
20 continuing to talk.

21 MR. RANK: No, Your Honor.

22 THE COURT: Okay. Mr. Boland?

23 MR. BOLAND: Yes. A couple of points, Your Honor.

24 First, getting to your last point first, with the
25 additional of these depositions that were in controversy. We

1 appreciate your comments, and we'll keep things focused.

2 Just to be clear, we have deposed a couple of the
3 people on that list within the time of fact discovery.

4 There's only two that are at issue, in our view, that we can
5 ask for clarification.

6 One is named Linberg (phonetic) (indiscernible)
7 patents, and we understand he retired from AZ earlier this
8 year.

9 There is a party named Cole, and he's in Germany,
10 and he's the named inventor on a prior (indiscernible) patent.

11 So -- but as to (indiscernible) AZ is proffering
12 their testimony. We would ask that AZ make those two people
13 available for depositions, if they want to use the
14 transcripts.

15 THE COURT: Uh-huh.

16 MR. BOLAND: In other words, it's their choice.
17 They can make them available, and we'll take the focused
18 depos; or if they choose not to, the transcripts just won't
19 come in --

20 THE COURT: Okay.

21 MR. BOLAND: -- and we won't have a need for the
22 depos.

23 THE COURT: And I thought I read somewhere in the
24 papers -- and frankly, I wasn't focusing on this part of it --
25 but that it is Hanmi's position that that was an agreement

1 that Astra had entered into at some point to produce them in
2 Washington. But Mr. Rank, what are you thinking, or do you
3 need to talk to your client?

4 MR. RANK: No, I don't need to talk to my client.

5 With respect to Cole, he doesn't work for
6 AstraZeneca; he always worked for a third party. Astra never
7 controlled him, per se. He was represented, in fact, by
8 different counsel at the dep -- at his prior deposition. And
9 frankly, it was never our intent to entering in -- when
10 discussing the stipulation with Hanmi, that a condition of the
11 use of the prior depositions was Hanmi's right to take those
12 depositions on new dates. In fact, I don't think it was
13 Hanmi's intention, either, because they agreed not to refile
14 old ground that was covered by the prior depositions.

15 But we can look -- I don't -- we can contact these
16 people, perhaps again. Linberg is a retired AstraZeneca
17 employee. Cole has never been an AstraZeneca employee. I'm
18 not so sure that, as to Cole, we have any sway in the matter.
19 And any deposition of him, to the extent it gets scheduled,
20 might have to be in Germany.

21 THE COURT: All right. Find that out. Obviously,
22 with Cole, you mentioned you had an attorney that you can
23 contact, so see what the attorney's position would be. And
24 then do your due diligence with Linberg to contact him and
25 see. And if you could let Hanmi know in quick turnaround

1 whether or not they will agree to coming to the tri-state
2 area, and if you can let me know in the next couple of weeks,
3 that would be great. And I say "couple of weeks" in the event
4 that we need to give Mr. Cole time to talk to his attorney and
5 the like. And then just shoot me a letter, and let me know
6 where that stands. Frankly, whether or not I can compel Astra
7 is a -- to produce them is a question; to produce them here in
8 the United States.

9 The other thing, certainly, Mr. Rank, find out if
10 they're amenable to being deposed in short order, without
11 going through the Hague Convention; and if so, is there an
12 agreement that they would come to the United States; and if
13 not, if they would agree to be deposed, but perhaps in
14 Germany, or I don't know if there's someplace else that would
15 be more convenient.

16 And let me through in the third: Depose by video.
17 And I recognize that that's a huge problem, often, for the
18 person taking the deposition. But I want to have all of those
19 questions answered as to their mind set, when this is lined up
20 for me, because I don't want to have to go back to you all and
21 ask for more information and cause more delay from my end.
22 Okay?

23 MR. RANK: We understand.

24 Your Honor, I guess I should be -- to be totally
25 frank, preliminarily, it appears that Dr. Cole, through his

1 attorney -- and they happen to be new attorneys; it gets more
2 complicated -- he's not inclined as of now -- we think is not
3 inclined to appear again anywhere for a deposition.

4 But at Your Honor's suggestion, we will make another
5 attempt and discuss the matter with -- with Hanmi's counsel,
6 and let the Court know --

7 THE COURT: Okay.

8 MR. RANK: -- where things stand within the next
9 couple of weeks.

10 THE COURT: So maybe -- if you offer to Cole's new
11 attorney that the Judge has suggested a hat trick, if they
12 understand hockey analogy, of options coming voluntarily to
13 the United States, sitting for a deposition voluntarily in
14 Germany, or sitting in Germany with counsel present and
15 someone from Hanmi flying over, or doing a video or telephonic
16 deposition. Obviously, I understand from Hanmi, without you
17 even saying it, that those last two are not what you're
18 looking for. But I would like to know what that person is
19 thinking and figure out what you need to do, what the next
20 step is.

21 And then Linberg, when was the last time you were in
22 touch with him? Because his deposition was taken in '08. Do
23 you know offhand?

24 MR. RANK: He retired -- he retired from AstraZeneca
25 earlier this year. But we will -- we'll reach out to him --

1 THE COURT: Okay.

2 MR. RANK: -- and -- and see what we can do there.

3 We'll discuss it with Hanmi's counsel and let the Court know
4 where things stand within the next couple of weeks, as Your
5 Honor suggested.

6 THE COURT: Okay. You can tell him New York is
7 wonderful this time of year. He might not mind coming to the
8 east coast.

9 MR. RANK: Oh, yeah. They're lighting the Christmas
10 tree tonight.

11 THE COURT: That's right. There you go.

12 All right. Mr. Boland, anything else from you?

13 MR. BOLAND: (Indiscernible) Your Honor. I would
14 note that AstraZeneca has offered Cole as its own witness in
15 proceedings in Europe.

16 THE COURT: Uh-huh.

17 MR. BOLAND: So we -- they at least have had that
18 type of control or relationship with him in the past.

19 THE COURT: Okay. Well, I'm not expecting this is
20 going to be an easy issue for either of you, meaning that
21 either of you is going to walk away readily.

22 The other thing that I will often ask, other option
23 that I will often ask individuals to consider is whether or
24 not you can hold off on doing the deposition until the time of
25 trial, so that can be accomplished before the person

1 testifies. So that's something that I'd want to hear from
2 you, Mr. Boland, once we hear what Astra relays regarding
3 their willingness.

4 And assuming that they're not willing to conduct a
5 deposition by any of those means -- and I do -- will say that
6 I do recognize that these depositions, you might say, are
7 important for your expert reports. But I throw that out there
8 anyway because it's something that we can often employ to
9 resolve this kind of issue in other cases.

10 But then again, these ANDA cases are very, very
11 special, as I'm continuing to learn. So that's just a seed I
12 will plant, and these are things that we can talk about once
13 we hear from Astra. Good?

14 MR. BOLAND: Thank you, Your Honor. It's Mark
15 Boland.

16 Just Mr. Rank made some comments previously about an
17 alleged claim construction issue that was raised by our motion
18 to amend that I didn't get a chance to comment. So if you'll
19 just hear me for a moment.

20 Your Honor was couching it in terms of fact
21 discovery, that Mr. Rank has allegedly identified pertinent to
22 that issue, that could perhaps be done in December. And I'd
23 just like to clarify the record. AstraZeneca hasn't
24 identified any fact discovery on that point at all. So we
25 don't think that that -- you know, there's a need for anything

1 there that hasn't already occurred.

2 The issue that we're seeking there is amendment to
3 assert infringement and a modest supplementation of
4 (indiscernible) validity. And the issues in terms of our
5 product have been embedded in prior depositions and in the
6 papers of record.

7 So the issue that Mr. Rank raised is, I think he's
8 suggesting that the Court set up and then conduct yet another
9 Markman proceeding, which we totally object to. Both of these
10 patents have been construed by Judge Pisano in the prior
11 (indiscernible) case. And then in our case, we've briefed a
12 whole bunch of issues, and the Court has been working on them,
13 and we know (indiscernible) issues under submission.

14 So for Mr. Rank to be saying we should set up yet
15 another entire briefing schedule (indiscernible) there's just
16 no room for that. And our motion clearly does not raise that
17 issue.

18 THE COURT: Uh-huh.

19 MR. BOLAND: Our motion is premised on a simple
20 (indiscernible) as to whether (indiscernible) are inside or
21 outside the scope of the claim. And when AZ filed the suit,
22 they took the position that they're covered by the claim. Our
23 position in the motion to amend is -- and I understand we're
24 not getting into the details today, but is that the litigation
25 record has changed based on AZ's own position.

1 THE COURT: Okay. Let me just jump in.

2 Mr. Rank -- and again, I wasn't set to -- as Mr.
3 Boland noted, we weren't really having a discussion about that
4 motion. I just wanted to make the suggestion that, if there
5 was discovery that you needed to do, and if it was of a fact
6 nature, or whatever nature, that could be conducted now, let's
7 get it done. Would there be this argument that we needed to
8 have a do-over of the Markman, or do you even need to see what
9 the Markman rulings are? Do you know?

10 MR. RANK: The point -- if the point, Your Honor, is
11 -- what I was alluding to that could be done, say, in December
12 -- in fact, we proposed it to Hanmi, but they have rejected
13 any notion of it. The point is that we could go through our
14 own exchanges about -- you can't construe a common claims
15 (indiscernible) without reference to particular terms in a
16 claim. We -- the point is we think -- in their motion to
17 amend the contentions, they're arguing claims (indiscernible),
18 claims (indiscernible), claims (indiscernible) throughout
19 their papers. It's a claim construction issue. They
20 injected it into the case by their motion to amend
21 (indiscernible) decided in one way, shape, or form. But we've
22 been unable to get them to even exchanging positions because
23 they claim it's not a claim construction issue.

24 THE COURT: Okay. But if you were to get the
25 additional time that you needed, which is the one, sort of a

1 *quid pro quo*, that you would consent to the amendment if you
2 had time, is built into that the concept of them being able to
3 go back and make an argument regarding claim construction? Is
4 that what I'm hearing?

5 MR. RANK: Yes.

6 THE COURT: Okay. All right. I don't know if that
7 alleviates one issue, but -- and if that would make sense to
8 do it that way. I mean, I'm thinking out loud.

9 Well, let me push back again and just say I'd ask
10 you folks to have your meet-and-confer on that issue. If you
11 could even eliminate whether or not there is new discovery to
12 be taken or the amendment is allowed, I don't know if Astra is
13 willing to take the risk that they agree to the amendment
14 without an agreement that you can have a second bite at the
15 apple, if you will, or raise this with Judge Pisano in terms
16 of claim construction, or if you want to just -- as you
17 probably have already said in your papers, that you're willing
18 to provide it. So just let us know that.

19 But again, I'm just trying to -- if there's a way of
20 moving you folks along, so that doing the discovery on any
21 issue is done. And then if we just get the substantive legal
22 or trial schedule issues raised before us, that would be
23 great, rather than waiting for a decision and then going ahead
24 and doing this discovery.

25 It might be for naught if the amendment is not

1 permitted. But frankly, given the time frame that we're
2 dealing with, that's my preference, and I don't say that
3 lightly.

4 So I don't know if that helps you, but I've got --
5 I've got an image of what the claim construction issue will
6 entail. If you folks think that that's something that's ripe
7 for me to revisit after you have a chat, and you can't come to
8 an agreement, or if you have -- it's morphed into something
9 different, then raise it with me, even while Judge Pisano is
10 issuing his order; I'm happy to have you do that. Don't wait
11 if you don't think it needs to wait. I don't want to be
12 holding you up. Okay?

13 UNIDENTIFIED: We'll have that discussion among
14 counsel, Your Honor, and hopefully we'll get resolution.

15 THE COURT: Okay. All right, guys. I know you know
16 where I am, and we've got a lot of sort of balls in the air.
17 If any of them come down and are ripe for me to deal with, let
18 me know, and we'll do what we need to do on this end to move
19 you along, and not be an impediment to the best of our
20 ability. Okay?

21 If I don't talk to you in this December --

22 UNIDENTIFIED: Thank you, Your Honor.

23 THE COURT: -- holiday season, have a good one. Be
24 well.

25 UNIDENTIFIED: You, too.

1 THE COURT: Okay. Thanks. Bye-bye.

2 UNIDENTIFIED: Thank you, Your Honor.

3 (Proceedings concluded at 11:54 a.m.)

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CERTIFICATION

2 I certify that the foregoing is a correct transcript
3 from the electronic sound recording of the proceedings in the
4 above-entitled matter.

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